Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A02–694 OF 1999
MOKHTAR SIDIN, ARIFIN ZAKARIA AND HASHIM YUSOFF JJCA
20 APRIL 2004

Labour Law — Employment — Transfer — Transfer of employees — Employees to be transferred to new division of estate — Absence of transferability clause in agreement — Whether employer has right to transfer — Whether transfer detrimental to employees — Whether transfer would constitutes change to terms and conditions of employment — Industrial Relations Act 1967 s 13

All the respondents in this case, except for the first respondent, were employed by the appellants as rubber tappers. Ladang Holyrood, the appellant, comprised two divisions namely the Main Division Estate ('the MDE') and the Bukit Rhona Division Estate ('the BRDE'). The respondents were attached to the BRDE and were informed by a letter dated 18 June 1994 that they would be transferred to the MDE as the rubber trees in the BRDE would be felled for replanting purposes. The respondents were not agreeable to the proposed transfer and instead asked the appellant to pay them termination and lay off benefits pursuant to the Employment (Termination and Lay Off Benefits) Regulations 1980. The respondents went on to file a claim before the Assistant Director of Labour under s 70 of the Employment Act 1955 ('the Act') claiming annual pay leave, indemnity in lieu of notice and termination benefits. The Assistant Director of Labour allowed their claim for annual leave and dismissed all other claims. The respondents then appealed to the High Court who allowed the appeal and ordered that the respondents be paid the indemnity in lieu of notice, termination benefits in addition to the annual pay leave. The appellant appealed to the Court of Appeal. The appellant contented that this was a normal occurence in the industry and that the learned trial judge had erred in law in holding that the appellant had no right to transfer the respondents. The respondents submitted that the appellants had had no right to transfer the respondents as their collective agreement did not contain a transferability clause.

Held, allowing the appeal:

(1) The issue before the court was whether the direction given by the appellant in this case amounted to a transfer or merely a relocation of task. The learned High Court judge was right in holding that in the present case, the relocation order was in fact a transfer order for the following reasons: (a) the distance between the two divisions was not less than 5km; (b) the respondents had always been working in the division and were provided living quarters in the same division; and (c) it has not been the practice to transfer workers from one division to another (see paras 8 and 12).

(2) The next question to consider was whether the appellant had any right under the contract of service to transfer the respondents to the main division. It was held in *Soon Seng Cement Products Sdn Bhd & Anor v Non-Metallic Mineral Products Manufacturing Employee's Union* [1996]

1 ILR 414 that the right to transfer an employee was the prerogative of the management. The court could only interfere if the transfer was actuated with improper motive. However the right to transfer is not without restriction. It must not entail a change to the detriment of an employee in regard to his terms of employment (*Assembly Services Sdn Bhd, Shah Alam/UMW Engineering Sdn Bhd, Shah Alam & UMW (M) Holdings Sdn Bhd, Shah Alam (joined as a party) and Motor Assemblers Supervisory Staff Union, Peninsular Malaysia* [1985] 1 ILR 489) (see paras 13 and 16).

(3) From the collective agreement, an employee may be required to tap rubber in either the low yielding area as well as in the high yielding area. Article 12 of the agreement provides that a rubber tapper working in low yielding field shall be paid a suitable rate and the average earnings of a rubber tapper in such field or area shall not fall below the basic wage. The respondents were bound by the collective agreement. The court agreed with the Assistant Director (see para 18).

(4) The trial judge also took into consideration the extra 20 mins each day that the respondents would take to travel to work. He held that this would amount to altering the terms and conditions of service to a less favorable one. The trial judge had interpreted the terms and conditions of service far too stringently. This did not constitute a material change in the terms and conditions of service. The effect of the transfer in the present case was not as drastic as suggested by counsel for the respondents (see para 21).

(5) With the regard to the payment of indemnity in lieu of notice as ordered by the learned judge under s 13 of the Act, he made the order on the premise that there is no transferability clause in the contract of service. He held that s 12(3)(e) of the Act applied to the respondents. For the reasons given earlier, on conditions that the employer has acted bona fide and in the interests of its business and is not actuated by any indirect motive or any kind of mala fide, the right to transfer is an implied right of the employer. In the circumstances the appellant had acted in accordance with these principles. Section 12(3)(e) of the Act does not apply to the present case. The order of the trial judge for payment of indemnity in lieu of notice under s 13 of the Act is hereby set aside (see para 22).

[Bahasa Malaysia summary

Kesemua responden dalam kes ini, kecuali responden pertama, telah diambil bekerja oleh perayu sebagai penoreh getah. Ladang Holyrood, perayu dalam kes ini, dibahagikan kepada dua bahagian iaitu Bahagian Utama Estet ('MDE') dan Bahagian Estet Bukit Rhona ('BRDE'). Kesemua responden bekerja diBRDE dan telah dimaklumkan melalui surat bertarikh 18 Jun 1994 bahawa mereka akan dipindahkan ke MDE disebabkan pokok-pokok getah di BRDE akan ditebang untuk ditanam semula. Kesemua responden tidak besetuju dengan cadangan perpindahan tersebut dan sebaliknya memohon supaya perayu

membayar faedah penamatan dan pemberhentian kerja menurut Peraturan Pekerjaan (Faedah Penamatan dan Pemberhentian Kerja) 1980. Responden selanjutnya memfailkan satu tuntutan di hadapan Penolong Pengarah Buruh di bawah s 70 Akta Pekerjaan 1955 ('Akta tersebut') menuntut cuti tahunan, tanggung rugi sebagai ganti notis dan penamatan. Penolong Pengarah Buruh telah hanya membenarkan tuntutan mereka untuk cuti tahunan dan tanggung rugi sebagai ganti kepada notis dan faedah-faedah penamatan kerja. Penolong Pengarah Buruh membenarkan semua tuntutan mereka untuk cuti tahunan dan menolak semua tuntutan yang lain. Responden kemudiannya telah merayu kepada Mahkamah Tinggi yang telah membenarkan rayuan mereka dan memberi perintah supaya responden dibayar tanggung rugi sebagai ganti notis, faedah-faedah penamatan kerja sebagai tambahan kepada cuti tahunan. Perayu merayu kepada Mahkamah Rayuan. Perayu berkata bahawa ini adalah sesuatu yang biasa berlaku di dalam industri ini dan hakim yang airf telah terkhilaf di sisi undang-undang dalam memutuskan bahawa perayu-perayu tidak mempunyai hak unutk memindahkan responden-responden. Responden-responden berkata bahawa perayu-perayu tidak mempunyai hak untuk memindahkan responden-responden sebab persetujuan bersama mereka tidak mengandungi klausa pemindahan.

Diputuskan, membenarkan rayuan tersebut:

(1) Isu di hadapan mahkamah ini adalah sama ada arahan yang diberi oleh perayu kepada responden-responden merupakan pemindahan ataupun relokasi tugas. Hakim Mahkamah Tinggi adalah betul dalam memutuskan bahawa perintah relokasi sebenarnya adalah perintah pemindahan untuk alasan-alasan berikut: (a) jarak di antara kedua bahagian tidak kurang daripada 5km; (b)responden-responden selalu bekerja di dalam bahagian itu dan telah diberi penempatan di bahagian sama dan (c) bukan amalan untuk memindahkan pekerja-pekerja daripada satu bahagian ke bahagian lain (lihat perenggan 8 dan 12).

(2) Soalan seterusnya untuk dipertimbangkan adalah sama ada perayu mempunyai hak di bawah kontrak perkhidmatannya untuk memindahkan responden-responden ke MDE. Di dalam kes *Soon Seng Cement Products Sdn Bhd & Anor v Non-Metallic Mineral Products Manufacturing Employee's Union* [1996] 1 ILR 414 bahawa hak untuk memindahkan seorang pekerja merupakan prerogatif pihak pengurusan. Mahkamah hanya dapat bercampur tangan jika pemindahan itu didorong oleh motif yang salah. Walau bagaimanapun, hak untuk memindah bukan tanpa had. Ia tidak boleh melibatkan penukaran yang menjejaskan seorang pekerja berkait dengan terma-terma pekerjaannya (*Assembly Services Sdn Bhd, Shah Alam/UMW Engineering Sdn Bhd, Shah Alam & UMW (M) Holdings Sdn Bhd, Shah Alam (joined as a party) and Motor Assemblers Supervisory Staff Union, Peninsular Malaysia* [1985] 1 ILR 489) (lihat perenggan 13 dan 16).

(3) Daripada perjanjian bersama, seorang pekerja mungkin diperlukan untuk menoreh getah sama ada di tempat yang mempunyai hasil kurang atau tempat yang mempunyai hasil yang tinggi. Perkara 12 perjanjian

memperuntukkan bahawa seorang penoreh getah yang bekerja di tempat yang mempunyai hasil yang kurang mesti dibayar pada kadar yang wajar dan gaji biasa seorang penoreh getah di tempat seperti itu tidak patut jatuh di bawah gaji pokok. Responden-responden diikat oleh persetujuan bersama itu. Mahkamah bersetuju dengan Penolong Pengarah (lihat perenggan 18).

(4) Hakim bicara juga telah mempertimbangkan tambahan 20 minit setiap hari oleh responden-responden untuk pergi bekerja. Beliau memutuskan bahawa ini akan menukar terma-terma dan syarat-syarat perkhidmatan kepada yang kurang baik. Hakim yang arif telah mentafsirkan terma-terma dan syarat-syarat perkhidmatan itu dengan ketat. Mahkamah tidak berpendapat bahawa ini merupakan penukaran terma-terma dan syarat-syarat yang material. Kesan pemindahan di dalam kes ini bukan begitu mendadak seperti yang dikatakan oleh peguam responden (lihat perenggan 21).

(5) Berkait dengan bayaran tanggung rugi sebagai ganti notis seperti yang diperintahkan oleh hakim yang arif di bawah s 13 Akta itu, beliau membuat perintah itu di atas premis bahawa tiada klausa pemindahan di dalam kontrak perkhidmatan. Beliau memutuskan bahawa s12(3)(e) Akta itu terpakai kepada responden-responden. Untuk alasan-alasan yang diberikan, di atas syarat bahawa majikan telah bertindak dengan bona fide dan di dalam kepentingan perniagaannya dan tidak didorong oleh motif tidak langsung atau sebarang mala fide, hak untuk memindah adalah hak tersirat majikan. Di dalam keadaan kes ini, perayu telah bertindak mengikut prinsip-prinsip ini. Seksyen 12(3)(e) Akta itu tidak terpakai kepada kes ini. Perintah hakim yang arif untuk bayaran tanggung rugi sebagai ganti notis di bawah s 13 Akta itu diketepikan (lihat perenggan 22).]

Notes

For cases on transfer, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1190–1194.

For transfer and secondment, see 7 *Halsbury's Laws of Malaysia*, para [120.077].

Cases referred to

Assembly Services Sdn Bhd, Shah Alam/UMW Engineering Sdn Bhd, Shah Alam & UMW (M) Holdings Sdn Bhd, Shah Alam (joined as a party) and Motor Assemblers Supervisory Staff Union, Peninsular Malaysia [1985] 1 ILR 489 (refd)

BP Malaysia Sdn Bhd v Chua Among @ Chai See Mong [1995] 1 ILR 357 (refd)

Georgetown Pharmacy (M) Sdn Bhd, Ipoh v National Union of Commercial Workers [1992] 2 ILR 377 (refd)

Kesatuan Kebangsaan Pekerja-Pekerja Ladang v Kesatuan Pekerja-Pekerja Di Dalam Kesatuan Sekerja [1992] 2 ILR 326 (refd)

Kumpulan Guthrie Sdn Bhd v Valaithan a/l Raman Nair & Ors [1990] 1 MLJ 294 (distd)

Metaldek Industries Sdn Bhd v Kamaruddin bin Tokimon & Ors [1998] 7 MLJ 342 (refd)
Shalimar Paints Ltd v Third Industrial Tribunal, Calcutta [1971] 2 LLJ 58 (refd)
Soon Seng Cement Products Sdn. Bhd & Anor v Non-Metallic Mineral Products Manufacturing Employees's Union [1996] 1 ILR 414 (refd)

Legislation referred to

Employment Act 1955 ss 12(3)(e), 13, 70
Employment (Termination and Lay Off Benefits) Regulations 1980

Appeal from: Civil Appeal No. 11–11 of 1996(T) (High Court, Taiping)

A Ramadas (M Jothi with him) (Ramadas & Associates) for the appellant.
P Kuppusamy (VK Raj with him) (P Kuppusamy & Co) for the respondents.

Arifin Zakaria JCA (delivering judgment of the court):

The background facts

[1] The facts in this case are not in dispute. They are briefly as follows. Except for the first respondent all the respondents in this case were in the employment of the appellant as rubber tappers. The first respondent was a mandore (tapping) also in the employment of the appellant. Ladang Holyrood, the appellant herein, comprised two divisions namely, the Main Division Estate and the Bukit Rhona Division Estate. The respondents were attached to the Bukit Rhona Division Estate. By a letter dated 18 June 1994, the respondents were told by the appellant that the rubber trees in the said division will be felled for replanting purposes. Consequently the respondents would be transferred to the Main Division with effect from 1 July 1994. The respondents did not agree to the proposed transfer. Instead they asked the appellant to pay them termination and lay off benefits pursuant to The Employment (Termination and Lay Off Benefits) Regulations 1980.

[2] By letter dated 30 June 1994 the appellant told the respondents to comply with the transfer order failing which the appellant would resort to the various options open to the appellant. This was followed by the letter of 6 July 1994 wherein the respondents were directed to report for work at the Main Division on or before 20 July 1994 failing which they will be deemed to have abandoned their employment. The respondents did not comply with the said order, but instead they brought a claim under s 70 of the Employment Act 1955 ('the Act') claiming the following reliefs, namely, the annual leave pay, indemnity in lieu of notice and the termination benefits. The claim went before the Assistant Director of Labour ('Assistant Director'). He allowed their claim for annual leave pay but dismissed all other claims.

[3] The respondents then appealed to the High Court which allowed the appeal and ordered that the respondents be paid the indemnity in lieu of notice and the termination benefit in addition to the annual leave pay. The appellant now appeals to this court against the decision of the learned judge. After having heard arguments of the parties we adjourned the matter for our consideration and decision. We now give our decision.

The contentions of the parties.

[4] We were told that the issue in this case is of considerable importance to the plantation industry as this concern the 'relocation of workers', which the learned counsel for the appellant contended, is a normal practice in the industry. He emphasized that such a practice is a normal occurrence in the industry arising from the need to have the old rubber trees replanted with new ones in order to increase the yield. He said the practice has been to relocate workers to the new area while the old trees are being felled. This he said is precisely what happened in the present case. In the alternative he argued even if the court holds that the relocation is in fact tantamount to a transfer as alleged by the respondents the learned trial judge had erred in law in holding that the appellant has no right to transfer the respondents in the present case. He contended that it is within the prerogative of the appellant, as the employer, to transfer the respondents any where within the same organization for as long as the transfer is reasonable and not tainted by any ulterior motive.

[5] He said in this case it is not disputed that the two divisions form part of the same estate with a common management. It is being run by a single manager and assisted by two assistant managers. For all intent and purposes it is a single entity. The respondents were paid by the appellant and would continue to be paid by the appellant even after the transfer to the Main Division. That is to say the respondents would continue to be in the same employment even after the said transfer. In the circumstances, he submitted there is no cause for complaint.

[6] The learned counsel for the respondents submitted that the learned judge was right in his decision on the premise that the contract of service as well as the collective agreement do not contain the transferability clause. In the absence of such a clause he contended the appellant has no right to transfer the respondents.

The issues

[7] From the facts it is clear that there is no written contract of service between parties. However, there is a collective agreement which had been taken cognizance of by the Industrial Court. The agreement was between the Malayan Agricultural Producers Association (MAPA), a trade union of employers in the plantation industry and the National Union of Plantation Workers, a trade union of employees in the plantation industry. There is no transferability clause in the agreement.

[8] The first issue as rightly stated by the learned judge is whether the order given by the appellant in this case was a transfer or merely a relocation of task as contended by the appellant. The Assistant Director in his decision held the view that this was merely a relocation of task rather than a transfer.

[9] The learned judge took the opposite view. Relying on the Indian case of *Shalimar Paints Ltd v Third Industrial Tribunal, Calcutta* [1971] 2 LLJ 58, he held that in the circumstances of this case the movement of tappers from

one division to another is a transfer within the meaning of the word 'transfer' appearing in s 12(3)(e) of the Act. In that case Mr Justice TK Basu came to consider the word 'transfer' and he expressed the following view:

> The expression 'transfer' in my opinion connotes that an employer has more than one place of business, and the employee is called upon to work in a different place of business from the one in which he worked previously.

[10] In the present case the learned judge held that the 'relocation order' is in effect a transfer of the respondents from one division to another. He came to this finding on the premise that the distance between the two divisions is more than 5km apart. He further relied on the testimony of the first respondent that in the 22 years he had been working in the estate there had never been any transfer of workers from one division to the other. For those reasons the learned judge concluded that 'the two divisions, albeit belonging to the same owner, were different places of employment'.

[11] Having said that, the learned judge then went on to hold that it is for the appellants to satisfy the court that the contract of service did contain such a clause. From the evidence before him he concluded that such a clause could not be so implied.

[12] Having considered the matter we are of the view that the learned judge was right in holding that in the circumstances the so-called relocation order was in fact a transfer order. We came to this finding for the following reasons:

(a) the distance between the two divisions is not less than 5km;

(b) the respondents had always been working in the division and were provided living quarters in the same division; and

(c) it has not been the practice to transfer workers from one division to another.

[13] We now turn to the next issue, that is, whether the appellant has any right under the contract of service to transfer the respondents to the Main Division. In *Soon Seng Cement Products Sdn. Bhd & Anor v Non-Metallic Mineral Products Manufacturing Employees's Union* [1996] 1 ILR 414 award no. 107 of 1997 the same issue came to be considered by the Industrial Court. There the court made the following observation which we think is highly pertinent to the issue before us:

> It is well established in Industrial Law that the right to transfer an employee from one department to another or from one post of an establishment to another or from one branch to another or from one company to another within the organisation is the prerogative of the management and the Industrial Court will ordinarily not interfere. But if the transfer is actuated with improper motive, it will attract the jurisdiction of the Court. The power to transfer is, therefore, subject to, according to Ghaiye's *Misconduct in Employment* (at pages 254 and 255), the following well recognised restrictions:
>
> (a) there is nothing to the contrary in the terms of employment;
>
> (b) the management has acted bona fide and in the interests of its business;
>
> (c) the management is not actuated by any indirect motive or any kind of mala fide;

(d) the transfer is not made for the purpose of harassing and victimising the workmen; and

(e) the transfer does not involve a change in the conditions of service.

And this right of transfer is also embodied in the Industrial Relations Act 1967, where it states that the company has the right to transfer its employees within the organisation so long as such transfer 'does not entail a change to the detriment of an employee in regard to the terms of employment' — s 13 of the Industrial Relations Act 1967.

[14] Similarly BR Ghaiye in his book *Misconduct in Employment* p 238 stated as follows:

It is generally held that the right to transfer an employee is an implied right of the employer and, therefore, no express term in the contract is necessary. The right exists even in the absence of contract unless there is a contract to the contrary. The implied right of an employer to transfer is available even when an employee is a probationer. In the absence of anything in the contract of service, general right of the management to transfer will remain.

[15] This proposition of law may be found in a number Industrial Court awards. (See *Kesatuan Kebangsaan Pekerja-Pekerja Ladang v Kesatuan Pekerja-Pekerja Di Dalam Kesatuan Sekerja* [1992] 2 ILR 326; *Georgetown Pharmacy (M) Sdn Bhd, Ipoh v National Union of Commercial Workers* [1992] 2 ILR 377 and *BP Malaysia Sdn Bhd v Chua Among @ Chai See Mong* [1995] 1 ILR 357).

[16] This right to transfer is not without restriction. In *Assembly Services Sdn Bhd, Shah Alam/UMW Engineering Sdn Bhd, Shah Alam & UMW (M) Holdings Sdn Bhd, Shah Alam (joined as a party) and Motor Assemblers Supervisory Staff Union, Peninsular Malaysia* [1985] 1 ILR 489 (Award 136 of 1985) the court observed:

… the company has the right to transfer its employees within its organisation, provided that such transfer does not entail a change to the detriment of an employee in regard to his terms of employment. It is well-established in industrial law that the right to transfer an employee from one department to another or from one post of an establishment to another or from one branch to another or from one company to another within the organisation is the prerogative of the management and the Industrial Court will ordinarily not interfere.

But if the transfer is actuated with improper motive, it will attract the jurisdiction of the court.

The power to transfer is, therefore, subject to (according to Ghaiye's *Misconduct in Employment* (at pp 254-255) the following well-recognised restrictions:

(a) there is nothing to the contrary in the terms of employment;

(b) the management has acted bona fide and in the interest of its business;

(c) the management is not actuated by any indirect motive or any kind of mala fide;

(d) the transfer is not made for the purpose of harassing and victimizing the workman; and

(e) the transfer does not involve a change in the conditions of service.

But whether a transfer entails a change to the detriment of an employee in regard to the terms of employment, or whether the transfer was bona fide is a question of fact for the court to determine.

[17] At this stage we think it is appropriate to consider the facts and circumstances of the present case. The principle ground relied upon by the respondents in resisting the transfer is that the transfer was to the detriment of the respondents. This is because the Main Division is located some 5km from the Bukit Rhona Division hence it would entail additional travelling time roughly around 15 minutes daily. The respondents further contended if they were to move to the quarters in the Main Division as proposed by the appellant they would incur additional costs in terms of bus fare for their school going children. The difference in the fare per child according the first respondent was around RM3 per month. The other grievance by the respondents is that their income would suffer; they claimed that in the Main Division the yield was lower than that in the Bukit Rhona Division due to the age of the trees.

[18] The appellant, however, contended that the basic salary for the task was the same as set out in the collective agreement. Further the appellant said the respondents had not adduced any evidence to support their contention.

[19] From the collective agreement it is clear that an employee may be required to tap rubber in either the low yielding area as well as in the high yielding area. Article 12 of the agreement provides that a rubber tapper working in low yielding field shall be paid a suitable rate and the average earnings of a rubber tapper in such field or area shall not fall below the basic wage. Based on the above we do not think that the fact that the transfer would result in the respondents having to work in low yielding area is any proper basis for the respondents to reject the transfer. The respondents were bound by the collective agreement. In this regard we agree with the Assistant Director. We are also of the view that the case of *Kumpulan Guthrie Sdn Bhd v Valaithan a/l Raman Nair & Ors* [1990] 1 MLJ 294, relied upon by the learned judge is, on the facts, clearly distinguishable from the present case.

[20] On the extra costs in terms of the bus fare for their children if they were to move to the Main Division our view is that the respondents were not forced to move to the Main Division. In fact they were given the choice either to stay on in the existing quarters or to move to the quarters in the Main Division. In any event in our view the claim here is far too trivial to be of any consequence.

[21] In allowing the appeal the learned judge also took into consideration the extra 20 minutes each day that the respondents would take to travel to work. In his view this would amount to altering the terms and conditions of service to a less favorable one. With respect to the learned judge we are of the opinion that he had interpreted the terms and conditions of service far too stringently. We do not think this constitutes a material change in the terms and conditions of service. Far from it. This is unlike in the case of *Metaldek Industries Sdn Bhd v Kamaruddin bin Tokimon & Ors* [1998] 7 MLJ 342 where the relocation involves a distance of some 250 km. The effect of the transfer in the present case is not as drastic as suggested by learned counsel for the respondents.

[22] Finally with the regard to the payment of indemnity in lieu of notice as ordered by the learned judge under s 13 of the Act, it is to be noted that

he made the order on the premise that there is no transferability clause in the contract of service. In the circumstances he held that s 12(3)(e) of the Act applies to the respondents. However, with respect to the learned judge, for the reasons given earlier, we are of the view that, on conditions that the employer has acted bona fide and in the interests of its business and is not actuated by any indirect motive or any kind of mala fide, the right to transfer is an implied right of the employer. In the circumstances of this case we find that the appellant had acted in accordance with these principles. For those reasons we hold that s 12(3)(e) of the Act does not apply to the present case. Hence, the order of the learned judge for payment of indemnity in lieu of notice under s 13 of the Act is hereby set aside.

Conclusion

[23] For the above reasons we allowed the appeal with costs here and below. The order of the learned judge is set aside and that the order of the Assistant Director is reinstated. Deposit to be refunded to the appellant.

Allowing the appeal.

Reported by Visahini Ganeson